

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

DETERRANCE ANDRE GRAY,

Defendant-Appellee.

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UNPUBLISHED

October 22, 2009

No. 288052

Wayne Circuit Court

LC No. 08-006963-FH

Before: Fort Hood, P.J., and Sawyer and Donofrio, JJ.

PER CURIAM.

The prosecutor appeals as of right from a circuit court order dismissing with prejudice the case against defendant because the adjournment that the court had previously granted was based on inaccurate information. We reverse and remand.

On August 20, 2008, the date set for defendant's bench trial, the court granted the prosecutor's request for an adjournment on the basis that an essential prosecution witness, a police officer, was not present because he was disabled. On the new trial date, August 28, 2008, counsel informed the court that the witness had not been disabled. The prosecutor conceded that the witness had been on duty in district court on August 20, 2008. The circuit court granted defendant's motion to dismiss because the court had been deceived regarding the reason for the prior adjournment.

On appeal, the prosecutor argues that the dismissal with prejudice was not an appropriate remedy in this situation, where it was not authorized by statute or the constitution. Defendant argues that the court's dismissal was not an abuse of discretion because either the prosecutor or the police had deceived the court to obtain the adjournment without a valid reason, and to subject defendant to further prosecution would deprive defendant of due process.

Generally, this Court reviews a trial court's ruling regarding a motion to dismiss for an abuse of discretion. *People v Adams*, 232 Mich App 128, 132; 591 NW2d 44 (1998). Examination of the trial court's authority to dismiss the charges with prejudice over the prosecutor's objection presents a question of law. This Court reviews questions of law de novo. *People v Sierb*, 456 Mich 519, 522; 581 NW2d 219 (1998).

The circuit court lacked authority to dismiss the charges with prejudice. As recognized in *Sierb*, *supra* at 531-533, the judiciary has a limited role in controlling the institution and conduct

of prosecutions. This Court has also recognized, “[T]he trial court’s authority over the discharge of the prosecutor’s duties is limited to those activities or decisions by the prosecutor that are unconstitutional, illegal, or ultra vires.” *People v Morrow*, 214 Mich App 158, 161; 542 NW2d 324 (1995). For example, dismissal of charges with prejudice is appropriate for violation of a defendant’s constitutional right to speedy trial, MCR 6.004(A), and for violation of the 180-day rule, MCR 6.004(D)(2). Dismissal of charges with prejudice is appropriate where double jeopardy bars retrial. See, e.g., *People v Wilcox*, 183 Mich App 616; 456 NW2d 421 (1990).

In the present case, the circuit court essentially dismissed the charges with prejudice as a sanction. The court did not find that defendant’s constitutional rights were violated nor did the court cite any court rule or statute to authorize its decision. Defendant asserts that further prosecution would deprive him of due process. But even if misconduct rising to the level of a violation of due process were established, which it has not been here, a due process violation does not necessarily entitle a defendant to dismissal with prejudice where jeopardy has not yet attached. See *People v Dunbar*, 463 Mich 606, 618 n 14; 625 NW2d 1 (2001). In this case, the court’s dismissal of charges with prejudice was to preclude the prosecution from re-filing the charges when there was no constitutional or statutory impediment to further prosecution. In the absence of a constitutional violation or specific statutory authority, the effort to preclude re-filing of the charges interfered with the prosecutor’s exercise of the executive function. *Sierb, supra* at 531-533. Moreover, even a dismissal without prejudice over the prosecutor’s objection as a sanction in these circumstances would have been questionable in light of the limitations on the court’s authority to nolle prosequi a case. *Morrow, supra* at 162.

Accordingly, the circuit court’s order dismissing the charges against defendant with prejudice is reversed, and the case is remanded for further proceedings.

Reversed and remanded for further proceedings. We do not retain jurisdiction.

/s/ Karen M. Fort Hood

/s/ David H. Sawyer

/s/ Pat M. Donofrio